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1 aside for a second and talk about your memory and then  
 2 maybe we'll come back to this. What do you recollect  
 3 after going through those steps you did next in relation  
 4 to classifying these positions as exempt or nonexempt?  
 5 A I furthered the study and ultimately talked with the State  
 6 and came to the conclusion about the positions that I was  
 7 concerned about, and -- and made some adjustment to some  
 8 of the positions.  
 9 Q Okay, and do you recollect which positions and what  
 10 adjustments you might've made?  
 11 A The one that I ended up telling the superintendents to  
 12 change were the warehouse, its foreman and warehousemen.  
 13 Q And they got changed from?  
 14 A Exempt to nonexempt.  
 15 Q All right, and ultimately you reviewed the safety  
 16 supervisor and decided not to change that, is that  
 17 correct?  
 18 A Safety -- I don't know that I....  
 19 Q I'm sorry, safety specialist....  
 20 A ....supervisor....  
 21 Q ....I misspoke....  
 22 A ....I did the specialist, yes.  
 23 Q Okay, all right. This is an aside, now. Have you ever  
 24 done a review of the safety supervisor position from 1996  
 25 to today to consider whether or not it ought to be exempt

1 A No.  
 2 Q Okay. Besides those reviews have there been any other  
 3 reviews -- a more formal review of the position of safety  
 4 supervisor for exempt/nonexempt status?  
 5 A For me personally? No, I -- I haven't done a more  
 6 formal -- has HR -- have we referred a lot of positions or  
 7 a lot of questions to our HR department over time to  
 8 review? Yes. Is a formal review done at that level, I  
 9 don't -- I don't -- I assume so, but I don't know that.  
 10 Q Okay. Would HR generally be the party or the section of  
 11 the company that would do the review for exempt/nonexempt?  
 12 A Well, I think the first step is the hiring official, so  
 13 the hiring official should be basically aware of the  
 14 exempt versus nonexempt review before they ever hire  
 15 somebody so we don't get into the situation they're hired  
 16 and then a week or a month or a year down the road we're  
 17 trying to change it on them. So it should be the hiring  
 18 official. If there's an issue down the road, then we  
 19 would involve an HR to make sure we're fair back with the  
 20 employee if the rate's changed, or they're reclassified.  
 21 Q Okay, coming back to the comment you made earlier about  
 22 the contracts you have with the, I take it, ARCO, BP  
 23 saying we want a quote for, I think you said, a nonexempt  
 24 employee at an exempt rate, is that how you put that?  
 25 A They'll come out with a spreadsheet that maybe has --

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1 or nonexempt?  
 2 A A review in the sense of a formal review or a mental  
 3 process review? Either/or?  
 4 Q Either way.  
 5 A Yes.  
 6 Q All right, and when was that?  
 7 A Periodically either a contract -- when we -- When we come  
 8 out with a new contract with our clients, the clients in  
 9 Alaska, BP, Conoco Phillips, by and large continue to come  
 10 out, even after this is gone our figures will continue to  
 11 come out and -- and request rates for positions that are  
 12 nonexempt to be quoted as a exempt status. So we are  
 13 constantly reviewing contractually -- I say constantly,  
 14 it's not a daily thing, but when a contract comes out we  
 15 will review that. So we also -- it also triggers us to  
 16 ask HR a number of times or Chris Boyle's department to  
 17 print out -- I don't know if it's every -- twice a year to  
 18 a year, but periodically to print out who we have  
 19 classified as exempt, so I do -- actually do a personal  
 20 review of that with my staff and question is this person --  
 21 -- should this person be exempt.  
 22 Q Okay, and when you say with your staff, who would that  
 23 involve, yourself and?  
 24 A My direct reports.  
 25 Q Okay. And would that involve Mr. Boyle or not?

1 let's use plumber, for example. We want a rate for a  
 2 plumber. And they'll put the category, day rate, they  
 3 want a quote for a day rate. We have to go back and say,  
 4 look, plumber is a nonexempt, we can't quote you a day  
 5 rate. We can quote you a rate that has all the appearance  
 6 of a day rate, but we're going to end up paying this guy  
 7 eight and 40 and overtime at this rate, and so we can't  
 8 exceed so many hours so we can ask it as a day rate. But  
 9 we come -- but for this person or this position is a  
 10 nonexempt position. And so we end up negotiating back and  
 11 saying, and -- back so that, we can't give you a quote  
 12 like that.  
 13 Q Okay, because basically for their purposes of bidding a  
 14 job or getting a job done they want a hard fixed number to  
 15 deal with?  
 16 A They want to be able to define their costs, they want to  
 17 know if they work a plumber a day it's going to cost them  
 18 X. They don't -- they don't -- the way they work is they  
 19 don't want to know it's going to be between A and Z, they  
 20 want to know X so they can calculate their costs daily.  
 21 Q And your problem is to say, well, we're sorry, we can't  
 22 give you that number because it's going to depend on the  
 23 number of hours the guys works?  
 24 A Sure.  
 25 Q How do you resolve that? Or do you?

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1 A We don't quote -- we -- we can't quote. We don't say....  
 2 Q Okay, so you put it back in their lap and let them work it  
 3 out, then?  
 4 A If you want to take the liability, go for it, but we don't  
 5 -- we're not willing to do that, sure.  
 6 Q All right. Do you ever end up supplying those services  
 7 and then getting a cost-plus reimbursement on them?  
 8 A The exempt/nonexempt positions?  
 9 Q Right. Let's say that you got to have a plumber, so you  
 10 give them a plumber....  
 11 A Right.  
 12 Q ....then does your -- the payment under your contract  
 13 vary dependent upon the number of hours the plumbers or  
 14 groups of plumbers worked?  
 15 A Yeah, the vast majority of our contracts are cost-plus, so  
 16 if the guy works one hour there's a percentage -- well, I  
 17 should say the contract like Kugaruk that this case has,  
 18 or centers around, we supply a plumber and if the cost is  
 19 X they reimburse us X. Doesn't matter if it's \$10 or it's  
 20 \$1,000, they reimburse us that actual cost. Then on the  
 21 side there's a management fee and we bill a management  
 22 fee. That breaks the incentive, if you will, of the  
 23 contractor to try and bill more hours, if you will.  
 24 There's no -- there's no more incentive for me to bill  
 25 more hours, say, on a Kugaruk contract. If I bill 10

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1 hours for what we did or 100 hours, we make the same  
 2 profit, if you will, as a -- as a company.  
 3 Q So you might get -- this is just to help us possibly  
 4 understand. You have a plumber, whether he works eight or  
 5 12 you might get a percentage of eight hours a day  
 6 management fee for him whether he works eight or 12, is  
 7 that....  
 8 A We would get the same -- typically the same management fee  
 9 to manage the contract whether there was five plumbers or  
 10 100 plumbers.  
 11 Q Okay.  
 12 REPORTER: Steve Jones?  
 13 Q And you had a conversation, you said, with Mr. -- well,  
 14 with the Department of Labor. Would that have been with  
 15 Randy Carr, which is indicated by some of these  
 16 latter....  
 17 A Yes.  
 18 Q ....letters? All right, and how many conversations did  
 19 you have with Mr. Carr, if you recollect? Was it one or  
 20 two or three?  
 21 A Oh, maybe say on the order of magnitude of, I would guess,  
 22 four. Four, maybe five.  
 23 Q Okay, and part of those, I take it, concerned the day rate  
 24 issue? Or, yes, the day rate issue?  
 25 A Yes.

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1 Q Did Mr. Carr also provide you with checklist sheets and  
 2 information concerning classification of exempt and  
 3 nonexempt employees, if you recollect? And I'd also draw  
 4 your attention, I guess, to Plaintiff's Exhibit 4, Pages  
 5 184 to 191.  
 6 A Are you asking me did Mr. Carr....  
 7 Q Did you get these from Mr. Carr, if you recollect?  
 8 A I -- I don't recollect.  
 9 Q All right, do you know where you got them? I realize that  
 10 sounds redundant, but....  
 11 A I don't recall.  
 12 Q All right, okay. Did you discuss directly with Mr. Carr  
 13 the position of safety specialist and whether or not that  
 14 ought to be classified as exempt or nonexempt, if you  
 15 recall?  
 16 A Yes.  
 17 Q And did he give you an opinion as to whether or not that  
 18 ought to be classified exempt or nonexempt or did he --  
 19 or, in the alternative did he give you information as to  
 20 how you might do it?  
 21 MR. YOUNGMUN: Object, compound question.  
 22 MR. COVELL: Okay, well, let me ask the first part of the  
 23 question, then.  
 24 Q Did he give you an opinion as to whether or not the safety  
 25 specialist was exempt or nonexempt?

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1 A Yes.  
 2 Q And what was that opinion?  
 3 A That the safety specialists were exempt, as I had  
 4 described the position to you.  
 5 Q Okay, did you send him a position description?  
 6 A I don't believe so.  
 7 Q Do you recollect what you told him the position was? Did  
 8 you tell him the safety specialist is the eyes and ears of  
 9 management, or do you recollect what you told him?  
 10 A I don't really recall the data -- the actual details of  
 11 that conversation.  
 12 Q Did you get an opinion letter from Mr. Carr, or a letter,  
 13 something in writing from Mr. Carr indicating that he was  
 14 expressing that opinion to you and/or APC?  
 15 A No. Regarding safety specialists?  
 16 Q Right.  
 17 A No.  
 18 Q Okay, you did get one that concerned a different position,  
 19 right?  
 20 A Yes.  
 21 Q The -- is that the materials supervisor, I believe?  
 22 A Right.  
 23 Q Okay, why didn't -- and you also sent the materials  
 24 supervisor position description to Mr. Carr, right?  
 25 A Yes.

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1 Q Why didn't you do the same for the safety specialist?

2 A At the time this was taking place I had concerns about a few positions. When I spoke with the safety specialists or safety supervisors -- and you've got to envision this, how this works up there. We live and eat and work in the same camp, so this isn't -- it's not a real formal setting. I've had meals with Mr. Zuber dozens and dozens of times, so it's not -- it's not a formal setting. So the conversation with the -- when I was talking with the supervisor, at the time Mr. Cannon, I believe was on the position, those guys, getting information out of them, and, of course, they ask, why do you want to know, what's the basis of the question. Well, I'm concerned about this, you know, I don't know whether you're exempt, you're nonexempt, what do you do. You know, I know what you do, work day to day, but help me with this, you know, let's kind of work through, there -- maybe there's some spreadsheets at the time, we ticked and tied to -- or, checked through them. The distinction is when I spoke with the safety supervisor there was no question in my mind that he was very professional, wanted to remain professional, wouldn't even hear of the -- being a nonexempt, if you will, because of the type of duties and whatnot, the type of classification. When I spoke with the materials supervisor and talking with him, it was

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1 virtually the same kind of an interesting conversation, because they did not want to be thought of as nonexempt. And so -- but I had -- when I had -- was having the conversation my alarm bells were going off, I'm thinking, well, maybe -- I actually think you are nonexempt, by based on what you're telling me, what I could find out. And so I asked these materials supervisor for additional detail around what they did. I really wanted to get more into it because everything I could come up with just in the general conversation was, no, you're nonexempt, so I need more on this information. And so then I asked them for additional information, which they provided, and may be in your packet, I don't know, I don't remember.

14 Q Okay, there's -- I think there might be their job description in there. All right, but you didn't -- is it correct to say that you didn't have the same types of concerns about the safety specialist? You didn't have the warning bells going off in your head....

19 A No.

20 Q ....as it were?

21 A No.

22 Q Okay, you said you talked to somebody that was, I believe you said, safety supervisor, who essentially was saying, yes, I want to be exempt. Do you recollect who that was?

25 A Well, I don't know that he said the words "I want to be

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1 exempt", I am a professional in my trade or my craft. That person knew mostly -- at the time it was Bob Cannon was the supervisor.

4 Q Okay. Did it occur to you to -- okay, let's see, let me withdraw that. You spoke to Nancy Williams at ARCO about classification issues, you notified Anne Hippe and the CFO about your concern of these issues, you spoke to Mr. Carr on a number of conversations, and based on -- okay, okay. Spoke to Mr. Carr a number of times. Outside of those external resources, as it were -- well, and you used these checklists. Outside of those resources did you use anything else to make your decision concerning the classification of safety specialists as exempt? If you recollect. And I....

15 A I don't believe so.

16 Q And, I mean, you're free to look at these materials because I think this is all we've got and I think that covers it. And your recollection....

19 A I'll take your word for it.

20 Q Well, I'm -- you're testifying, not me, so....

21 MR. YOUNGMAN: Go through the materials.

22 Q Okay, why don't you go ahead and take a minute to do that. I'm just....

24 A Well, my recollection is no, when I -- when I talked with the State in my mind that was the highest authority that I

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1 could find, that I could easily talk with and when I spoke with the State -- And I had met Mr. Carr prior at one of the seminars, he spoke at a -- some type of an Alaska legal review kind of -- he does that. I think I had heard him speak a couple times, I felt very comfortable with him, his interpretation, he's a -- he's a very open guy, if you've never talked with him. He's -- he'll pick up the phone, you call him, he calls you back. My recollection, a couple conversations with him and I felt after talking with him I was very comfortable with our determination and where we were headed. The reason I asked him for the determination letter for warehouseman, which -- got you off on a side track there for a second -- was because when I talked with the warehousemen they were very adamant that they were also professionals in their tasks. I said, guys, you aren't -- and I got 'em all together, and you aren't -- not that you're not professional, you're very professional in what you do, but you -- I don't believe you meet the criteria. They wanted to talk with Randy Carr personally. I said, hey, he's a State employee, you guys can call him. I actually think one of the supervisors eventually did talk with them. But when it all came down, I said, look, I asked Mr. Carr for -- I believe I wrote him a letter, that may be in here, but I wrote him a letter and said I actually need

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1 you to put it in writing because these guys do not believe  
2 that they don't fit the -- into the exempt category.  
3 Which subsequently came out this letter that he sent me.  
4 Q All right, but you -- in regard to safety specialists you  
5 don't recollect what you told Mr. Carr the safety  
6 specialists did?  
7 A Well, I would -- I would've describe their -- their day to  
8 day duties to Mr. Carr and had a conversation back and  
9 forth, which he offered the -- he actually offered a  
10 verbal opinion about every one. It was really only the  
11 warehousemen that I said, look, I got a problem here with  
12 the morale and the issue of my employees, I need you to  
13 put it in writing because they don't believe it.  
14 Q Let me draw your attention here to -- why don't we look at  
15 Page 163, we see the third or fourth paragraph, depending  
16 on what you do with the bullets, it says, "One of the more  
17 complex areas of", could you read that paragraph for us?  
18 A Want me to read it out loud?  
19 Q Yes, please.  
20 A "One of the more complex areas of the FLSA is its  
21 classification of certain employees as exempt or excluded  
22 from coverage by the overtime requirements of the law. An  
23 employee is presumed to be nonexempt", parentheses,  
24 "covered by the law and entitled to receive overtime pay",  
25 comma, "unless the employee (sic) can show that the

1 talking to Mr. Carr or if you did it at another time, if  
2 you know?  
3 A I don't recall, it was part of the file and it was  
4 something that would've been part of the overall  
5 determination.  
6 Q Okay, you checked off there under administrative test  
7 "performs office or nonmanual work directly related to  
8 management policies or general business operations", and  
9 you checked that. I take it that that means that you felt  
10 that a safety specialist does that, is that so?  
11 A Yes.  
12 Q All right, let me draw your attention to the other set of  
13 checklists, which is Page 166, and up towards the binding  
14 there there's some notations -- well, out here. Is that  
15 your handwriting on the right-hand side of that paper?  
16 A Yes.  
17 Q All right, and that says "directly related to management  
18 policies, this means to affect" with an A "these  
19 policies", slant, "change the".....  
20 A Change them.  
21 Q "Change them, not work with (sic) . . . policies", and  
22 that's to the right of an arrow that comes off of "primary  
23 duty is office or nonmanual work directly related to  
24 management policies or general business operations of the  
25 employer or" the "employer's customers". Do you recollect

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1 employee's job duties and pay meet certain criteria".  
2 Q Did you review that material when you were doing this  
3 review back in '96, '97? Did you read this paper, 163?  
4 A I -- I'm sure I did, sure.  
5 Q Okay. And you -- and you did read the Forbes article,  
6 which is perhaps -- would you agree, to paraphrase it it  
7 sort of says this area is a quagmire? That a fair way to  
8 characterize that article?  
9 A Don't really recall, I haven't read it recently, but....  
10 Q Okay, well, it's kind of like a watch-out article, isn't  
11 it?  
12 A Oh, sure, that was my -- set my alarm bells off, yes.  
13 Q All right. And then I draw your attention to Page -- I  
14 think it's -- I've probably gone by it here -- 154 and  
15 155. Is that your handwriting on 154?  
16 A Yes.  
17 Q All right, and did you use this checklist to make your  
18 determination concerning -- or, what did you use this  
19 checklist for?  
20 A Checklist was the basis that I went through, I don't know  
21 that I ever truly completed it per se, it's not obviously  
22 formal by any means in the sense that I formalized it or  
23 signed it. It is my handwriting and I did use it to  
24 formulate the basis for classification of our employees.  
25 Q Okay, do you know if you filled this out when you were

1 making that note?  
2 A It's my writing, so I -- I'm sure I did, yes.  
3 Q And do you know where you got that information from in the  
4 note?  
5 A I can't say verbatim, it -- it could have been from my  
6 discussions with Randy Carr. At the time I viewed him as  
7 the chief specialist, if you will, but I -- I can't say  
8 that.  
9 Q Okay, what duties does a safety specialist have that  
10 affects or changes policy?  
11 A What duties?  
12 Q What does a safety specialist do that fulfills that  
13 requirement as it was to be exempt?  
14 A You mean beyond the -- okay, you're at what does a safety  
15 specialist do that affects policy?  
16 Q Sure, affects policy, yeah.  
17 A Well, the safety specialist is one who -- who actually --  
18 in the oilfield a big piece of our work is safety, right?  
19 So it's a little bit hard to imagine, maybe, if you don't  
20 work, there's a policy for everything, especially back in  
21 '96 when -- when maybe this was going -- but in '96 we  
22 were very light on policy, if you will. Safety  
23 specialists at that time were -- were formulating,  
24 writing, coaching, everything to do with those -- those  
25 policies and procedures that were being formulated at the

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1 time. So when you say affect, to a certain extent writing  
2 them, input, change, were -- how were -- well were they  
3 being implemented, did they work, didn't they work,  
4 there's, I should say, binders on it.

5 Q Okay, so these are policies that safety specialists  
6 generated and then were eventually adopted by APC, is  
7 that....

8 A Yes.

9 Q ....what you're telling me?

10 A Sure.

11 Q All right. And these would be in writing, then? The  
12 policies?

13 A Oh, yeah, yes.

14 Q Who would eventually approve those policies?

15 A The ultimate approver?

16 Q Sure.

17 A At the time would probably be -- there would probably be  
18 more than one approver, but you would likely have the --  
19 because the intent of the policy is that you -- it's not  
20 just to come out with a policy and everybody has to live  
21 with it, you want buy-in. So you get -- you get buy-in  
22 through -- so you get -- if the safety specialist came --  
23 let's say, came up with a procedure or policy, then they  
24 would look for maybe the construction manager or the  
25 superintendent or the operations manager to also approve

1 area or group that they're working with, what do you guys  
2 think. You know, his -- his or her people that work  
3 within that and say what do you think, how does this  
4 affect us. And then is this what we want to do. And then  
5 -- and then get buy-in to maybe the operations manager at  
6 the time, it would go into -- would make the changes to  
7 the policy.

8 Q Would the safety specialist go to the operations manager  
9 with the proposed change in policy or would the safety  
10 supervisor do that?

11 A Typically it would be the specialist would get the buy-in  
12 of the supervisor, or his peer group, the other  
13 specialists. They'd say, what do you guys think, how does  
14 this affect your areas or your work. You know, you're  
15 dealing with people here that it's not a real structure.  
16 They're out working a lot on their own, so they come  
17 back -- they come back, they have certainly some buy-in  
18 from the supervisor, from the operations side and that's  
19 how a policy would get changed or affected. In the time  
20 frame of '96, '97 we were very -- we have very few  
21 policies and procedures, we were really developing a lot  
22 of them. And so there were a lot of policies being  
23 written from -- from scratch, if you will.

24 Q By the time frame of September of '99 to January 2001 was  
25 there much of that activity?

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1 these. Typically over a period of time, it's not  
2 something that was done with rubber stamp, bingo, this is  
3 the day, it's done, but over time and the policies and  
4 procedures evolved. They still evolve today, call them  
5 living procedures or living -- whatever you want to call  
6 them. They continue to evolve. A lot of people,  
7 certainly, especially the specialists, can affect those  
8 policies. And do.

9 Q On a day to day basis does a safety specialist affect or  
10 change safety policy?

11 A An -- an established -- well, day to day, I'm not sure --  
12 yes. I mean, day to day if they're out there, the eyes  
13 and the ears of management, and there is a need for a  
14 change or need to be effected, yes, that could -- would  
15 be, likely could be, would be initiated by a safety  
16 specialist.

17 Q Okay, and how -- what would they do to effect change in  
18 policy? And would they call the safety supervisor, would  
19 they write a memo, how mechanically would they go about  
20 doing this?

21 A Maybe if the policy was -- they wanted to affect it, they  
22 could say I don't -- I think this should be changed in  
23 this way, they'd go into the policy, make -- make the  
24 change. I mean, there's lots of mechanisms for it,  
25 because they -- they could take that to, then, the -- the

1 A From -- say -- repeat the question?

2 Q September of '99 to January 2001 was there much activity  
3 of writing, initiating policies?

4 A Well, a lot of policy had been developed. Did we continue  
5 to affect it? Yes. Are we continuing to write even more  
6 detailed policy down to job tasks? Yes.

7 Q When a safety specialist -- and I take it when you said  
8 the specialist would go in and change the policy, what  
9 you're talking about is changing a draft of the policy and  
10 not changing the actual policy, is that so? In other  
11 words, when he starts the task he says, okay, here's a  
12 policy, I -- he might change -- make up a draft and say,  
13 I'd like to see a policy or procedure in this manner.  
14 He's not going in the book and changing the book and  
15 saying we're going to do this now.

16 A Well, if there was an established policy, sure, he can't  
17 go in and just make a change, an arbitrary change, sure.  
18 If there was no policy for it, he could -- he could start  
19 the draft, sure. Let me -- I could use an example maybe  
20 near to Ron in the sense that we started training,  
21 specific -- around specific kind of training. He may have  
22 developed that policy specific to training and buy-in from  
23 his peers, got the buy-in from the supervisor, maybe from  
24 myself at the time, and then if that was what the  
25 specialist said is the policy and we all felt we could buy

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1 into it, then that became the -- the policy, if you will,  
 2 and it was rubber stamped.  
 3 Q Okay, and as operations manager you'd be involved in that  
 4 process?  
 5 A Sure, a review of that, yeah. Typically not drafting.  
 6 Q All right. Can you tell me what policy or policies Ron  
 7 Zuber as a safety specialist affected in the manner we  
 8 just described?  
 9 A Can I think of....  
 10 Q Can you give me any specific examples?  
 11 A Ron Zuber, champion of champion trainers, SMS training,  
 12 safety in motion. I mean, out of state, went to out of  
 13 state training, was a champ -- what we call a champion  
 14 trainer, champion expert. He not only trained in SMS,  
 15 which stands for safety in motion, he trained the trainer,  
 16 if you will. He's our -- he's our expert, beyond our  
 17 expert. I mean, he is -- he was the guy. Did Ron Zuber  
 18 have a tremendous amount of effect, if in fact he didn't  
 19 write it? I don't know for a fact, but the APC policy  
 20 around SMS I -- I suspect he had a tremendous amount of  
 21 influence, if he didn't write it, over that policy.  
 22 Q Okay, so it's your impression, as it were, that he....  
 23 A Yeah, I can't say....  
 24 Q ....he wrote or contributed to the policy?  
 25 A Yeah.

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1 Q Okay, any others?  
 2 A He would've had to. I mean, you know, he was the guy.  
 3 Q Okay. How long was this SMS training for, do you know?  
 4 Was it like 40 hours or five days or two weeks or do you  
 5 recollect?  
 6 A SMS training was a series of training, I can't even tell  
 7 you the time. I went through it myself years ago, been  
 8 through refreshers, but it's not a two-week training, it's  
 9 a over the course of a -- over the course of a day,  
 10 something like that.  
 11 Q Okay, all right. Do you know whether or not -- if there  
 12 were procedures implemented in relation to SMS, if they  
 13 were taken essentially wholesale from the training  
 14 materials and adopted as an APC procedure?  
 15 A I don't know.  
 16 Q Okay. Besides the SMS training being an example of  
 17 perhaps where Mr. Zuber might've affected policy do you  
 18 have any other examples for us?  
 19 A Verbatim to Mr. Zuber, you mean, or....  
 20 Q To mister -- sure. For starters....  
 21 A No, not -- not -- I don't recall, you know, Ron working a  
 22 specific policy and procedure, but I can't relate to any  
 23 specific one at some point he did.  
 24 Q All right, if he had been involved in doing that to a  
 25 substantial degree would there be some kind of paper trail

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1 out there that would document it?  
 2 A Today?  
 3 Q Sure.  
 4 A I doubt it. Because the author, author or those who  
 5 affect a policy today, there's not a -- you know, at the  
 6 bottom of the procedure it doesn't say contributions made  
 7 by Mark Nelson. It's not there.  
 8 Q We just don't get our names on these papers like we  
 9 should?  
 10 A No -- no recognition for that type.  
 11 Q Okay. Looking back to Page 154, the second factor in the  
 12 administrative test says "customarily and regularly  
 13 exercises discretion and independent judgment." Can you  
 14 tell me what a safety specialist does where they  
 15 customarily and regularly exercise discretion and  
 16 independent judgment?  
 17 A Well, a safety specialist, unlike a lot of jobs, doesn't  
 18 have a supervisor who stands over them and says at 6:00  
 19 o'clock you will do this, 7:00 o'clock, you'll do that,  
 20 you better have this out, you know, by the end of the  
 21 week, here's your schedule, here's your time frame. A  
 22 safety specialist is very independent in their work, day  
 23 to day work, for a large part they're left to their own --  
 24 own direction, recognizing what's -- what their tasks  
 25 should be on a day to day. And so that's about as close

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1 as I can describe discretion and independent judgment for  
 2 you. He -- he was out -- or, in this case Ron was out  
 3 really every minute of every day with independent judgment  
 4 and discretion.  
 5 Q One of the things a safety specialist does is confined  
 6 space entry permits, or permitting, I should say, is that  
 7 right?  
 8 A Sure.  
 9 Q Okay. And in doing that one of the tasks is to sniff a  
 10 vessel or a tank with a -- some nature of a industrial  
 11 hygiene instrument, I guess?  
 12 A Sure.  
 13 Q Okay. When a safety specialist does that they're checking  
 14 for toxic gases, right? Is that what they're checking  
 15 for?  
 16 A Permissible levels, right.  
 17 Q Okay, and in -- if Mr. Zuber were to check a tank, if  
 18 there's a permissible level, that criteria for permit  
 19 issuance is met, right? I mean, there are other steps. I  
 20 assume, in issuing a permit for hot work or confined space  
 21 entry.  
 22 A Say that again?  
 23 Q When you issue a confined space entry permit....  
 24 A Yes.  
 25 Q ....I assume there's a number of criteria that have to be

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1 met before the permit's issued?  
2 A Yes.  
3 Q Among them would be sniffing for permissible levels?  
4 A Would be one step, sure.  
5 Q and you -- I at least understand in some instances you  
6 might need to have oxygen tanks for the people going in  
7 and you might need ventilation and you might need a rope  
8 to the person going in, is that....  
9 A Well, I -- yeah, I hope it's not so simple as that, but  
10 yes, there's -- there's a tremendous amount of....  
11 Q Okay.  
12 A ....of -- yes, right.  
13 Q Right, I don't -- don't expect it's that simple, but for  
14 me to try to digest. But if he were to sniff a tank, if  
15 it's a permissible level then that particular criteria for  
16 permitting is met and they can go on to the other issues  
17 that are -- presented themselves, or needed to be explored  
18 to get the permit going, right?  
19 A They being?  
20 Q Mr. Zuber, the....  
21 A Yes, then they would -- yes, that's one -- one step, if  
22 you will.  
23 Q If the level of gas is higher than a certain standard,  
24 then they can't issue the permit, right?  
25 A Lots of reasons they wouldn't issue a permit. That's one

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1 reason, yes.  
2 Q A safety specialist doesn't have any discretion to say,  
3 well, this gas almost meets the level and therefore in  
4 this particular instance I'm going to decide to have the  
5 permit issued, does he? In other words, if the standard  
6 is you have to have below a .030 of some molecule in the  
7 tank and you have a .032 or .035, the safety specialist  
8 can't say that's close enough, go ahead?  
9 A Right, the safety specialist -- let's say the permissible  
10 level for oxygen is -- boy, whatever, point, whatever, 18  
11 or something like that. But that's a no brainer. You or  
12 I could easily make that determination. That's not where  
13 we need, in this case, Mr. Zuber's judgment and  
14 independent thought processes to make that determination.  
15 It's clearly not on the black and white stuff like that,  
16 absolutely. If that answers your question.  
17 Q That's not a -- okay, so in instances like that....  
18 REPORTER: This is a suspicious one, can you just....  
19 MR. COVELL: All right, you bet.  
20 (OFF THE RECORD)  
21 (ON THE RECORD)  
22 Q Okay, I think we were sniffing tanks before we got on the  
23 telephone. And so in that instance Mr. Zuber's applying  
24 facts to a known standard and has no discretion, is that  
25 fair to say? That's essentially what you told me, right?

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1 A Yes.  
2 Q Okay, all right. When a safety specialist is doing his  
3 job he has various policies to refer to to insure that  
4 work is being done safely, is that correct?  
5 A Yes.  
6 Q Okay, when you did his review -- I think we pretty much  
7 covered this, we talked about the resources you used in  
8 doing it, but to beat the dead horse, did you look at or  
9 consult either -- well, did you look at or consult the  
10 Code of Federal Regulation that interprets issues such as  
11 what regularly exercises discretion and independent  
12 judgment means?  
13 A Not beyond my conversation with Randy Carr, no. I didn't,  
14 right.  
15 Q Okay. Let me read you a portion of 29 CFR 541.207. "The  
16 term discretion and independent judgment "as used in the  
17 regulations of subpart A of this part, moreover, implies  
18 that a (sic) person has the authority or power to make an  
19 independent choice free from immediate direction of  
20 supervision ... with respect to matters of  
21 significance". Then I've got a break in it there, just  
22 for the record, moving on to small (b) in parens, "The  
23 term must be applied in the light of all the facts  
24 involved in the particular employment situation in which  
25 the question arises. It has been most frequently

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1 misunderstood and misapplied by employers and employees of  
2 (sic) cases involving the following": colon, "1, confusion  
3 between the exercise of discretion and independent  
4 judgment and the use of skill in applying techniques,  
5 procedures or specific standards; and, 2, misapplication  
6 of the term to employees making decisions relating to  
7 matters of little" importance. And then this is under  
8 (c)(1), "An employee who merely applies his knowledge in  
9 following prescribed procedures or determining which  
10 procedure to follow, or who determines whether specified  
11 standards are met or whether an object falls into one or  
12 another" -- "one or another of a number of definite  
13 grades, classes or other categories, with or without the  
14 use of testing or measuring devices, is not exercising  
15 discretion and independent judgment within the meaning of  
16 Section 541.2. This is true even if there is some leeway  
17 in reaching a conclusion, as when an acceptable standard  
18 includes a range or a tolerance above or below a specified  
19 (sic) standard". If -- in hearing that does that change  
20 your thoughts about whether or not a safety specialist  
21 exercises independent -- exercised -- regularly exercises  
22 discretion and independent judgment?  
23 A No. You want me to relate that -- I mean, help you with  
24 my -- I just keep -- I'm -- because -- I just want to ask  
25 you the -- you relate sniffing a tank, right, where we